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Richard McKennett

NOTE

THE OMNIBUS CLAUSE AND EXTENSION OF COVERAGE BY THE COURT

In the last forty years, one of the most litigated clauses of all insurance policies is that included in most automobile liability insurance policies called the omnibus clause. The language used therein may vary slightly[1] from one insurer's policy to another but all follow this general outline: "Those covered under this policy include the named insured and, except where specifically stated to the contrary also any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured."[2]

The questions concerning this clause are numerous and varied but five specific issues dominate the history of litigation brought in our courts with reference to the omnibus provision. These five questions are: (1) What constitutes capacity in the named insured to grant permission to use the automobile and thereby bind the insurer? (2) How does one interpret the term "actual use" as included in the clause? (3) When permission is granted to another by the named insured, what amount of deviation in the actual use of the car, if any from that permission should be allowed before coverage under the policy must be denied to the permittee? (4) Is the permission by the named insured always to be expressed or could such permission to operate the automobile be implied so as to bind the insurer? (5) When the named insured grants permission to use the automobile to one permittee, can that first permittee delegate this permission to a second permittee and thus bind the insurer? Obviously, a number of factual situations will cause an overlapping of the five separate questions; this analysis of the omnibus clause, however, will be divided into five parts in order to deal with each of the above issues.

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1. *E.g.*, Compare the SPECIAL AUTOMOBILE POLICY of 1959 (stock company form) that states " . . . any other person using such automobile to whom the named insured has given permission",and the language of a 1958 FAMILY AUTOMOBILE POLICY or a 1959 PACKAGE AUTOMOBILE POLICY that states " . . . provided the actual use thereof is with the permission of the name insured."

2. Language taken from a paper prepared for the Automobile Insurance Committee under the supervision of Charles F. Ryan and Wm. M. Howell (1959) (Defense Research Institute Material).

1. *What Constitutes Capacity In The Named Insured To Grant Permission To Use The Automobile and Thereby Bind The Insurer?*

Under the omnibus clause, coverage may be extended to persons other than the named insured only when the named insured gives to those persons permission to use *his* car. The key word here, however, is *his* car. When a car owner seeks to obtain liability insurance he seeks primarily to protect himself from liability in the event of an accident. Therefore, the policies generally will protect him in his own car or even in the event he has an accident while driving another car. However, it must be remembered that the omnibus clause of his policy, though a means by which the coverage is extended beyond himself is essentially included only to protect the named insured. It is for this reason that this clause applies only to his own car when he allows another person to operate it. The clause is inserted in order to protect the named insured who could become vicariously liable for the negligent actions of a person whom he has allowed upon the public bi-ways in *his* automobile. His vicarious liability would attach only through the permission he has granted to drive *his* car. It is due to this distinction that part of the issue of capacity to grant permission arises.

Where a vendor of a car under a conditional sales agreement attempted to extend the insurance coverage to the conditional vendee, the court held that the vendor was not the owner of the car and did not have the capacity to grant permission to the vendee to use the car. Thus, the vendee was not an omnibus insured.[3] In fact, a conditional sales vendor of a car cannot extend omnibus coverage under his insurance policy to the vendee even where the vendee has defaulted and the accident occurs as the vendee is returning the car to the vendor upon the vendor's demand.[4] The court reasoned that the vendor could not permit such use until he had actual possession, in that the vendor, upon default, has only the right to repossess and no further control.

However, in a state that requires transfer of title in order to secure ownership (title state) if the vendor has not so transferred the title and he is the named insured, he then has the capacity to grant permission to the vendee and thereby bind the insurer.[5] It would thus appear that in all of these cases dealing with the capacity to grant permission the court looks to: (1) the position of the certifi-

3. Olin Mathieson Chem. Corp. v. Southwest Gas Co., 149 F. Supp. 600 (D. Ark. 1957), *see also* American Fidelity Co. v. Daniels, 122 Vt. 14, 163 A.2d 617 (1960).

4. Farm Bur. Mut. Ins. Co. of Indiana v. Emmons, 122 Ind. App. 440, 104 N.E.2d 413 (1952); *see also* Weatherford v. Aetna Ins. Co., 385 S.W.2d 381 (Tex. 1964).

5. United States Fidelity & Guaranty Co. v. Downs, 320 S.W.2d 765 (Ark. 1959); Schmidt v. State Farm Mut. Auto. Ins. Co., 8 Cal Rptr. 179 (Cal. App. 1960).

cate of title to the car; that is, who has the title to the car at the time of the accident or (2) the realization by the person granting the permission of his capacity to do so.

This ownership distinction may be classified further by reference to the situation in which the named insured bought a car and then gave it to his son. When the son had an accident, the court ruled that the named insured could not grant permission to the son by which the insurer would be bound.[6] If he had allowed the boy to use the car before he had given it to him as a gift, and the accident had then occurred the boy would have been an omnibus insured; but once the ownership of the car had passed, the clause could not be applied.

The question concerning the capacity to grant permission to use an automobile comes up in a further situation where the named insured grants the permission and then becomes incapable of affirming or denying it. (This then deals with the grantor's realization of his capacity to grant permission.) In this situation the best test to be used in deciding whether coverage should extend to the permittee, and the test used by the courts, is to determine whether the insured could effectively deny permission to use the automobile; if he could deny it, he has the capacity to grant it.

Thus, in a case where the named insured had died before the accident but after granting a general permission to use the car to the driver of the car at the time of the accident, the court held that the death did not end the permission.[7]

Also, where the named insured became mentally incompetent after granting permission to her son to use the car, the court declared that the permission had never been revoked and thus the son was an omnibus insured. If the named insured was incompetent to grant permission she would also be unable to revoke it.[8]

The essential thing to be noted in the discussion concerning the capacity of a named insured to grant permission is the basic need to first determine its presence before going any further in the omnibus clause issue. For without this factor no coverage may be granted; it is the first essential step. Having established this factor one may proceed.

II. *How Does One Interpret the Term "Actual Use" As Included In The Clause?*

This question may arise in the situation where the first permittee is a passenger in a car driven by a person to whom this

6. Maryland Gas Co. v. Powers, 113 F. Supp. 126 (W. D. Va., 1953).
7. Bornas v. Standard Acc. Ins. Co., of Detroit, Mich., 171 N.Y.S.2d 947 (1958).
8. Toney v. Henney, 166 F. Supp. 85 (N.D. Ohio 1958).

first permittee granted permission to drive, and the courts are called upon to decide whether the first permittee was *using* the automobile at the time of the accident in such a way as to bind the insurer. The courts have generally decided these cases under the same rules as used in deciding whether the second permittee would be covered if the first permittee were not there.[9] Some courts, however, have gone so far as to decide that as a passenger in the car the first permittee is correctly using the car.[10] The insurer's have always argued, however, that the word "use" refers to the "use" causing the accident and that it refers to the "use" at the time of the accident by the person claiming coverage.

A further problem with this term cropped up in determining whether "actual use" and "operation" are synonymous. In a 1960 New Jersey case the issue concerned whether omnibus coverage extends to a person who was expressly prohibited by the named insured from operating the car, but who did operate it in carrying out a purpose permitted by the insured. The Supreme Court of New Jersey held that under the omnibus clause of the policy which extended coverage to any person while "using" the insured car, provided the "use" was with the permission of the insured; the driver of the car was an additional insured and within the scope of the clause. In so holding they reasoned that a distinction should be drawn between *use* and *operation*. The court pointed out that under the general omnibus clause, coverage depends on whether the *use not the operation* was allowed by the insured.[11] What this court appears to have omitted is that in order to extend coverage under this clause not only must the permission to use be granted by the insured but also the permission to drive the car must have been given to the one who was driving at the time of the accident. The actual use must both be within the scope of the purpose for which the permission is granted and also by the person to whom permission was granted.

This situation was further complicated in a decision of the Fifth Circuit Court in 1960 which held the insurer liable for a shooting accident that happened as the named insured *used* his car as a gun rest to shoot at a distant deer. In this case, the bullet did not clear the top of the car, but ricocheted into the car killing a passenger seated therein. The insurer argued that the car was not being

9. *E.g.*, Garland v. Audubon Ins. Co., 119 So.2d 530 (La. App. 1960); *see also* Oklahoma Farm Bur. Mut. Ins. Co. v. Bryant, 318 P.2d 430 (Okla. 1957).

10. *E.g.*, Butterfield v. Western Gas. Sur. Co., 83 Idaho 79, 357 P.2d 944 (1960); State Farm Mut. Auto. Ins. Co. v. Cook, 186 Va. 658, 43 S.E.2d 863 (1947).

11. Indemnity Ins. Co. of North America v. Metropolitan Cas. Ins. Co. of New York, 33 N.J. 507, 166 A.2d 355 (1960); *see also* Freeman v. Nationwide Mut. Ins. Co., 147 Conn. 713, 166 A.2d 455 (1960). (Insurer liable even though the person driving at time of accident was expressly forbidden to do so by insured).

used as a vehicle at the time of the accident and that there should be no coverage. The court, however, noted that no such limitation is placed upon the word "use" in the policy, and that when there is a question of interpretation of a word in a policy the court must adopt the meaning most favorable to the insured.[12]

From the above examples, one can see how the courts, by stretching the meaning of the term "actual use" in the omnibus clause, are in efffect rendering the term virtually meaningless. This action of the courts seemingly has forced the policy writers of, at least, two insurance companies to revise the requirements in order to explicitly spell out its bounds. Their policies now state: "The following are insureds, . . . (1) the named insured and any resident of the same household, (2) any person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission. . . ."[13]

To alleviate this problem and to more fairly decide the issue involving the term "actual use" or its counterparts when they are inserted in the omnibus clause, all of the courts would do well to follow the example set by the Fourth Circuit Court of Appeals when it refused to liberalize and expand these terms.[14] In so doing, the court aptly stated that it may be desirable to require " . . . coverage broad enough to protect all who suffer injury from any use of an insured automobile, except perhaps a thief, or even then. Such all-inclusive coverage, however, cannot be judicially imposed against the plain and legally unforbidden restrictions contained in an insurance policy. The command for universal coverage, if such it is to be, must come from the legislature."[15] Though the courts have taken an increasingly active part in the formation of the law in order to keep the law abreast with society's needs, and rightly so, such changes should not be effected in such a way as to impose a hardship on one of two parties to an agreement or contract, when those parties have already clearly agreed upon the terms.

III. *When Permission Is Granted To Another By The Named Insured What Amount Of Deviation In The Actual Use Of The Car, If Any, From That Permission Should Be*

12. Fidelity & Cas. Co. v. Lott, 273 F.2d 500 (5th Cir. 1960).

13. 1966 HARTFORD ACC. & INDEM. CO. FAMILY AUTOMOBILE POLICY, FORM 8080, and 1968 ST. PAUL FIRE & MARINE INS. CO. FAMILY AUTOMOBILE POLICY.

14. Farmer v. Fidelity and Cas. Co. of N.Y., 249 F.2d 185 (4th Cir. 1957).

15. *Id.* at 189. (For a 1968 decision expressing a similarly limiting view, *see* Rogers v. State Farm Ins. Co., 243 Ark. 887, 422 S.W.2d 677 (1968).

Allowed Before Coverage Under The Policy Must Be Denied To The Permittee?

The "permission" of the named insured as required in the omnibus clause has been variously classified as "general," "limited," "express," "implied," or "legal." The number of variations clearly indicates the difficulty that the courts have had in dealing with this basic aspect concerning the clause. In this section of the analysis of the omnibus clause and its problems, the most difficult issues for the court are dealt with. It is in regard to the scope of the permission granted that the vast majority of the litigation must deal. In this respect, the courts may generally be said to follow one of three rules: (1) The Strict or Conversion Rule, (2) The Liberal or Initial Permission Rule, and (3) The Minor Deviation Rule.[16] Of course, though the courts of a particular state or jurisdiction generally will be exclusively within one of the three classes, some overlapping does occur when particular hard cases arise. In fact, one author when dealing with this subject categorized the various decisions not as to one of these three rules, but as to the status of the person using the automobile and claiming coverage under the omnibus clause.[17]

The "strict" or "conversion" rule requires that the actual use of the car at the time of the accident must be one contemplated when the original permission for use of the car was given. The decisions which support this view will allow no coverage if the permittee varies in the slightest degree from the exact permission given by the named insured. The rationale behind it is that if there is any deviation in the actual use from that permitted, then the user has in reality *converted* the car to his own use and is no longer a permissive operator. Thus, the time at which the bailment was to end must not have passed; the place at which the car was used at the time of the accident must be one either specified or contemplated by the parties; and the use of the car at the time of the accident must be either specified or contemplated.[18] The number of states following this strict rule with no deviation at all allowed is quite naturally very small and is generally confined to a few states in the northeastern United States. Of course, in specific instances many courts might appear to follow this rule. To follow this rule, though no doubt greatly favored by the insur-

16. The classifications are very general and the titles that I use are merely arbitrary, though descriptive in some degree, and follow those enumerated in AM. JUR. (7 AM. JUR.2d 483).

17. *See generally* Austin, *Permissive Use Under the Omnibus Clause of the Automobile Liability Policy*, 29 INS. COUNSEL J. 49 (1962).

18. *E.g.*, Johnson v. American Auto. Ins. Co., 131 Me. 288, 161 A. 496 (1932); Laroche v. Farm Bur. Mut. Auto. Ins. Co., 335 Pa. 478, 7 A.2d 361 (1939).

ers, would lead to a great deal of unjustified and unwarranted hardships in cases of minor deviation, and is, thus, much too extreme.

The liberal rule goes to the opposite end of the continuum from the strict rule. It is probably most generally referred to as "the initial permission rule" although the Ninth Circuit Court once referred to it, quite aptly, as "the hell and high water rule."[19] Under this line of decisions if the original taking was with the consent of the named insured, every subsequent act by the permittee as long as he is the bailee is held to be with the consent of the insured. Thus, here any deviation from the original permitted use is considered immaterial.[20]

The extent to which this initial permission rule may be stretched is best exemplified by two New Jersey decisions, since the New Jersey court appears to have gone as far as any court in the United States in wholeheartedly adopting this extreme rule. In one decision, the borrower of the named insured's automobile had borrowed it for the sole purpose of visiting his mother who was in the hospital. The borrower, however, after dutifully visiting his mother then made three separate trips to taverns in the area in the borrowed car and became quite intoxicated before the accident occurred. The court ruled that the insurer was nonetheless liable under the policy.[21]

In the second decision, the named insured had requested his nephew to drive his wife back and forth to the hospital where he was a patient and to do other errands while he was laid up, both requiring the use of insured's car. However, after taking the insured's wife home one evening the nephew and a friend decided to go from Baltimore to New York for the weekend. On the way they picked up five hitch hikers and the nephew's friend had taken over the driving at the time of the accident. In deciding whether the nephew was a covered permittee the New Jersey Supreme Court held that the initial permission rule requires only two tests: (1) was there permission to use the car initially and (2) did the subsequent use constitute theft or the like. They then said that the scope of the use was immaterial under this rule and that the subsequent use may deviate and still be within the rule. The court further stated that the transfer of possession with the

19. United States Fidelity & Guaranty Company v. Smith, 279 F.2d 678, 679 (9th Cir. 1960).

20. The leading case in this line of decision is Dickinson v. Maryland Cas. Co., 101 Conn. 369, 125 A. 866 (1924); *see also* Traders & General Ins. Co. v. Powell, 177 F.2d 660 (8th Cir. 1949); Zitnik v. Burik, 395 Ill. 182, 69 N.E.2d 888 (1946); Garland v. Audubon Ins. Co., 119 So.2d 530 (La. App. 1960); Foley v. Tennessee Odin Ins. Co., 193 Tenn. 206, 245 S.W.2d 202 (1951). (This rule followed in Ark., Ill., N.J., La., Mass., Tenn. and Conn.).

21. Matits v. Nationwide Mut. Ins. Co., 33 N.J. 488, 166 A.2d 345 (1961).

intention that the car be operated by the transferee on public roads is a grant of permission to use within the interpretation of the omnibus clause. The court held for the nephew as against the insurer.[22]

The courts that favor this rule especially use it in cases where permission is granted by an employer to an employee for some business purpose and the employee deviates from this purpose either slightly or materially. Thus, the clause covered an employee of the named insured even though he used the car in direct violation of an express prohibition given by the named insured.[23] In such cases, all that need be shown is that the employee had the permission to use the car in the first place,[24] and then the employee is covered unless there was a termination of that permission.[25]

Tennessee, though a state that follows the "initial permission rule," has qualified its decisions by denying coverage where the use is specifically limited for a business purpose and time period, and the employee uses the car for his own purpose.[26] The Tennessee court, however, has ruled that if the deviation from the specified use partly benefits the owner-named insured and the accident occurs while the employee is returning to duty, the omnibus coverage does apply.[27] By this latter decision it would appear that though the Tennessee courts edged toward a step in the right direction, they faltered and virtually retracted it.

To strictly follow this initial permission doctrine as some courts have done brings forth the same type of objection as the Fourth Circuit Court so aptly noted in regard to the extensive stretching of the meaning of the term "actual use" by the courts.[28] It appears to be unwise to sacrifice the position of one party to an agreement solely to attempt to protect all accident victims. If one desires such extensive coverage as indorsed by this rule, the correct means of accomplishing it would be by legislation and not the judiciary.

The proponents of this line of decision, however, do well in justifying the results. First, it must be noted that it is a general rule of construction of insurance policies that when the language

22. Small v. Schuncke, 42 N.J. 407, 201 A.2d 56 (1964). (For a discussion of the problems presented when a permittee attempts to pass his permission to another driver as in this case, *see* page 28 of this paper.).
23. McKee v. Travelers Ins. Co., 315 S.W.2d 852 (Mo. 1958).
24. Peerless Ins. Co. v. Schnauder, 290 F.2d 607 (5th Cir., 1961).
25. Konrad v. Hartford Acc. & Indem. Co., 11 Ill., App.2d 503, 137 N.E.2d 855 (1956); *see also* Arnold v. State Farm Mut. Ins. Co., 260 F.2d 161 (7th Cir. 1958) (as to what constitutes termination note the pertinent discussion in this paper *infra*.).
26. Hubbard v. United States Fidelity & Guaranty Co., 192 Tenn. 210, 240 S.W.2d 245 (1951).
27. Preferred Acc. Ins. Co. v. Barker, 104 F.2d 424 (6th Cir. 1939).
28. Farmer v. Fidelity & Cas. Co. of N.Y., 249 F.2d 189 (4th Cir. 1957).

in the policy is ambiguous or vague it must be construed most strictly against the insurer. This rationale was used by the Eighth Circuit Court in extending coverage under the omnibus clause to a nonpermissive user of a non-owned automobile.[29] The second argument used by the backers of this rule is their claim that it is designed to assure that persons who cause automobile accidents are able to answer financially to their innocent victims. As stated above, this reasoning may be well taken, but the legislature is the proper means of accomplishing this goal.[30]

The most widely accepted rule and the one that appears to be the best is the "minor deviation rule." Here what is done is that the courts basically adopt the strict rule but then in applying this rule they modify it so as to allow extension of coverage in the case of a minor deviation. The major problem in this type of ruling is that in every individual case the court must decide whether a deviation is *minor* or *material*. In so determining this the courts must, of course, look at the exact amount of deviation from the original permission in regard to distance, time or purpose.[31]

To best deal with the wide range of situations and cases arising under this third rule, it will be most convenient to divide the discussion into two groups: 1) Employee users and 2) Social users. This is necessary because the courts apparently allow less deviation in respect to employees than they allow for social users. This position is maintained in spite of the refusal of some writers[32] and court decisions to indorse such a trend. For example, the Seventh Circuit Court maintained, quite logically, that if an employee gets permission to use the employer's truck for business and instead uses it for his own pleasure and on the pleasure trip an accident occurs, the employer would not be liable at law as the employee would be beyond the scope of his employment; but the employee is still an omnibus insured.[33] Furthermore, in 1956, it was held that if the employee has exceeded his permission under the omnibus clause no coverage extends even though the employee is still within the scope of his employment.[34] The general trend nevertheless appears to deal with the two classes of cases differently. In fact, there have been severe conflicts debated in cases

29. McMichael v. American Ins. Co., 351 F.2d 665 (8th Cir. 1965).
30. In this connection and following this general desire to insure all motorists in order to protect the accident victim *see* the Keeton-O'Connell plan, recently proposed in Congress. *Infra* N. 96a.
31. The minor deviation rule is followed specifically in Kansas, Ga., Ky., Ohio, Mo., Okla., W. Va., Va., Minn., and Wash. and presumably followed in most of the rest of the states of the U. S. including N. D.
32. *E.g.*, paper prepared for the Auto. Ins. Comm. under the supervision of Charles F. Ryan and Wm. M. Howell (1959) (Defense Research Institute Material). (These writers maintain that the scope of employment has no bearing on omnibus clause cases.).
33. Arnold v. State Farm Fut. Ins., 260 F.2d 161 (7th Cir. 1958).
34. Boyd v. Liberty Mut. Ins. Co., 232 F.2d 364 (D.C. Cir. 1956).

where the policy has both an omnibus clause and a special exclusion in regard to injuries to and liability incurred by an employee of the insured arising out of the course of his employment.[35]

Turning now to the situation of employee users. Although there can be no hard rule applied, it may generally be stated that where the use of the car is very closely connected to the permitted use, the deviation will be held minor.[36] When dealing with employees, the courts ruled that the following, however, were material deviations, and thus, denied coverage; (1) in regard to distance, a sixty mile unauthorized trip;[37] (2) in respect to time, four hours overdue on a short trip with time expressly made important by the named insured;[38] (3) generally joyrides are frowned upon when the named insured in an employer,[39] and (4) a clear case of intoxication at the time of the accident.[40]

It must be noted at this time that when dealing with employee users who deviated from the express permission of the employer to any *substantial* degree, the courts deny recovery. This is true even if the employer has said nothing concerning personal use of the vehicle.[41] It follows naturally then, that if the employee has deviated in time, purpose, direction, or distance from the expressed permission to such a degree that the actual use of the car could not have possibly been contemplated by the named insured, no coverage is allowed.[42] The degree of the unwillingness of the courts to extend coverage to deviating employees is exemplified by the case of a mechanic who had been told by his employer to take a car out that night and the next morning to test it. The mechanic did take the car but after dinner he drove the car with his wife and children to his father's home about twenty-six miles away. An accident occurred on the return trip but the court refused to allow coverage, even though the employer had said nothing as to personal use.[43]

It is quite clear from a number of decisions that where the named insured expressly prohibits personal use by an employee, the employee is not covered if an accident occurs while he is vio-

35. *See generally* Risjord and Austin, *"Who Is The Insured" Revisited,* 28 INS. COUNSEL J. 100 (1961). For a decision denying recovery for an employee under the omnibus clause where there is a specific employee exclusion *see* Pennsylvania Manufacturers' Ass'n Ins. Co. v. Aetna Cas. & Sur. Ins. Co., 426 Pa. 453, 233 A.2d 548 (1967).

36. *E.g.,* Stoll v. Hawkeye Cas. Co. of Des Moines, Iowa, 193 F.2d 255 (8th Cir. 1952).

37. Brower v. Employers' Liability Assur. Co., 318 Pa. 440, 177 A. 826 (1935).

38. Collins v. New York Cas. Co., 140 W. Va. 1, 82 S.E.2d 288 (1954).

39. Frederiksen v. Employers' Liability Assur. Corp., 26 F.2d 76 (9th Cir. 1928).

40. Hartford Acc. & Indem. Co. v. Peach, 193 Va. 260, 68 S.E.2d 520 (1952). *But see* New York Cas. Co. v. Lewellen, 184 F.2d 891 (8th Cir. 1950) (drinking but while using the vehicle for business purpose; coverage allowed.).

41. Jones v. Union Auto. Indem. Ass'n of Bloomington, Ill., 287 F.2d 27 (10th Cir. 1961); *see also* Scott v. Massachusetts Bonding & Ins. Co., 273 S.W.2d 350 (Ky. 1954).

42. Speidel v. Kellum, 340 S.W.2d 200 (Mo. App. 1960); Fisher v. Firemen's Fund Indem. Co., 244 F.2d 194 (10th Cir. 1957).

43. Williams v. Travelers Ins. Co., 265 F.2d 531 (4th Cir. 1959).

lating this instruction.[44] This point is further exemplified in the situation where an employee was allowed to take the company truck home at night to store it and then to drive to work in the morning in it. However, the employer had specifically forbidden any use of the vehicle for personal pleasure. The court denied coverage when an accident occurred while the employee was using the truck for personal purposes.[45]

All decisions, however, do not deny the employee recovery under this "minor deviation rule." Generally, the permission of the named insured is not ended when the employee is using the car for business purposes but in violation of a company rule such as the prohibition to carry passengers.[46]

Furthermore, slight deviations for the personal benefit of the employee do not ban coverage. For instance, where the permission was granted to go home from work and the employee stopped for medicine,[47] or stopped for beer but did not drink any,[48] or stopped at the post office,[49] or went for a scenic ride of four or five miles;[50] the courts allowed recovery under the omnibus clause.

In closing the discussion concerning employee users under the "minor deviation rule," it should be noted that termination of the original permission occurs when the employee surrenders possession of the car after accomplishment of the purpose for which he originally took the car. This, of course, is the final limiting factor concerning the scope of an employer's permission to an employee.[51]

The second portion of this analysis of the "minor deviation rule" deals exclusively with users who are social friends or relatives. At the outset it must be emphasized that in cases involving a loan of a car for social reasons, the borrower being either a friend or a relative, a general, all inclusive permission is much more apt to be assumed by the courts.[52] Thus, even where the named insured grants permission to use the car only for a specific purpose of the permittee and the permittee deviates slightly from

44. Hodges v. Ocean Acc. & Guarantee Corp., 66 Ga. App. 431, 18 S.E.2d 28 (1941) *cert. denied,* 316 U.S. 693 (1941); *see also* Peerless Ins. Co. v. Schnauder, 290 F.2d 607 (5th Cir. 1961).

45. McKee v. Travelers Ins. Co., 315 S.W.2d 852 (Mo. 1958).

46. Hartford Acc. & Indem. Co. v. Collins, 96 F.2d 83 (5th Cir. 1938) *cert. denied,* 305 U.S. 627 (1938).

47. Maryland Cas. Co. v. Williams, 184 F.2d 983 (5th Cir. 1950).

48. Eicher v. Universal Underwriters, 250 Minn. 7, 83 N.W.2d 895 (1957).

49. State Farm Mut. Auto. Ins. Co. v. Birmingham Electric Co., 254 Ala. 256, 48 So.2d 41 (1950).

50. Yorkshire Indem. Co. of N.Y. v. Collier, 172 F.2d 116 (6th Cir. 1949).

51. Sun Underwriters Ins. Co. v. Standard Acc. Ins. Co. of Detroit, Mich., 47 So.2d 133 (La. App. 1950).

52. *See* Scott v. Massachusetts Bonding and Ins. Co., 273 S.W.2d 350 (Ky. 1954); *see also* Lloyds America v. Tinkelpaugh, 184 Okla. 413, 88 P.2d 356 (1939).

this purpose, the coverage under the omnibus clause still covers the permittee.[53]

Yet, even in respect to permission granted to a friend or relative a substantial deviation in time,[54] place,[55] or purpose[56] will deny coverage. This tendency to deny coverage by the courts is strengthened further when the permission is granted with express directions to use the car for some benefit of the named insured and when the accident occurs the permittee is using the car for his own personal pleasure.[57] Thus the more certain and restrictive the limitation on permission is, the greater the tendency of the court to decide that a deviation is material.

A decision of the Minnesota Supreme Court in 1966, is a very good example of the general way the courts that follow the "minor deviation rule" determine cases concerning the omnibus clause issue of a deviation by a friend or relative. In that case, the named insured had given the defendant permission to use the automobile to take the insured's daughter to a movie with specific instructions to return immediately afterwards. Instead, the defendant had driven to another town twenty miles away; the accident happened after he and the insured's daughter had returned to the town where the movie was showing. Also, the accident happened at a time when they might have been expected to be returning from the movies. In this action the insurer sought a declaratory judgment relieving it of all liability under the omnibus clause; however, the trial court ruled that the omnibus coverage still applied. The Supreme Court of Minnesota affirmed that decision, declaring that from the evidence it could be inferred that the owner's instructions were merely admonitory and not so explicit as to demand a finding of a substantial deviation. It must be added here, however, that this decision was, at least, partly caused by the court's liberal interpretation of the Minnesota Safety Responsibility Act which provides that a non-owner driver will be considered the agent of the owner when the car is being operated with the express or implied *consent* of the owner. The insurer argued that the operation of the car may have been with the owner's *consent* but not with his *permission* as required by its policy. This court conceded that the two words were not always

53. *E.g.*, Rivas v. Killins, 346 S.W.2d 698 (Mo. App. 1961); Wood v. Kok, 360 P.2d 576 (Wash. 1961).

54. *E.g.*, Wallin v. Knudson, 46 Wash.2d 80, 278 P.2d 344 (1955).

55. *E.g.*, Davis v. Zurich Gen. Acc. & Liability Ins. Co., 229 F.2d 156 (4th Cir. 1956); Exner v. Safeco Ins. Co., 402 Pa. 473, 167 A.2d 703 (1961).

56. *E.g.*, Auto Owners Ins. Co. v. Olney, 84 Ohio L. Abs. 242, 172 N.E.2d 741, *aff'd* 172 N.E.2d 746 Ct. of Common Pleas, Franklin County, (1958); *see also* Employers Cas. Co. v. Williamson, 179 F.2d 11 (10th Cir. 1950).

57. *E.g.*, M.F.A. Ins. Co. v. Lawson, 336 S.W.2d 123 (Mo. 1960); *see also* Jones v. Farm Bur. Mut. Auto. Ins. Co., 159 F.Supp. 404 E.D. (No. Car., 1958).

coextensive, but held that in this instance the permittee had been within the scope of the insureds' *consent* and *permission*.[58] The reference to the state statute is interesting here, however, since it re-emphasizes a point made earlier in this paper in the section concerning the capacity to grant permission. The omnibus clause, though a means by which coverage is extended to persons other than the insured, is essentially inserted in the insurance policies to protect the named insured from any vicarious liability as is the situation here. This is a basic point to be made concerning the omnibus clause in any situation.

No further detail concerning the "minor deviation rule" as it is applied to non-employee permissive users is needed because all the general considerations applicable to the non-employee were sufficiently covered under the employee situation. The general guidelines remain the same. In closing the analysis of this particular issue concerning the omnibus clause several comments are in order. First, it appears quite obvious that in most situations in which the omnibus clause question might arise, the "minor deviation rule" will best determine the validity of the requested extension of coverage beyond the named insured. In so deciding these cases, however, the courts must attempt to balance as best they can; the interests of the contracting parties as agreed upon in the insurance contract and the interests of the accident victims or even more basic, the needs of society as a whole. It should be remembered though, that the courts should not sacrifice the insurer's rights under the contract merely to compensate the innocent victim, for in one sense, at least, the insurer is also an innocent party. Secondly, the greatest problem concerning this third choice (minor deviation) is the great pressure that it places upon the courts as they must determine whether a deviation is minor or substantial. This must be looked at separately in every new case that arises, since all of the individual facts must go to determining the answer to this question. Third, and closely associated with the second comment, one should view each of the variations from the permission by the owner in their proper perspective. Thus, it appears that a deviation in purpose, that is to say a gap between the permitted conduct of the user and the actual conduct and behavior of the user, should bring forth the closest scrutiny by the courts and the greatest restrictions. A deviation in time or place could be much easier justified than could one of purpose. This, of course, is not to say that a great deviation in time or place should be disregarded, but only that more latitude should be

58. Allied Mut. Cas. Co. v Nelson, 274 Minn. 297, 143 N.W.2d 635 (1966).

allowed here than in purpose. As an illustration let us take a situation where the user has an accident while not on the most direct or most common route from the owner's home to the place where the permittee was allowed to go, and contrast it with a situation where the permittee is intoxicated or driving at a grossly excessive speed though on the direct route. The risk to the named insured would normally be increased much more in the latter of the two situations. Also, permission to use the car for a trip to the hospital would be quite different in the eyes of most car owners than would be a trip to three bars, or even a use by the permittee of the car as a bed so that he could sleep while some other driver unknown to the named insured drives the automobile. Of course, in this connection, it must be recognized that often the deviation will be in both time or place and purpose. Such a deviation would always tend to cause the courts to lean toward the denial of coverage.

IV. *Is The Permission By The Named Insured Always To Be Expressed Or Could Such Permission To Operate The Automobile Be Implied So As To Bind The Insurer?*

According to the case law on this subject in various jurisdictions, permission from the owner of the automobile may well be implied for the purposes of extending the operation of the omnibus clause. The courts that have implied permission are not only those following the liberal line of decisions, but they include almost any court that has been faced with a situation concerning one of several sets of general facts from which the requisite permission may be implied.

Implied permission for the personal use of an automobile arises from evidence of: a general custom or a history of frequent past use; certain conduct by the named insured; and, the relationship of the parties. Turning first to the subject of general custom or a history of frequent past use. Though the term "general custom" is frequently used by the courts, not only in this situation but in other contract and tort decisions, they have never really defined the term in the context of implied permission. One thing which can be noted about it, however, is that the condition in this context is used only in the employer-employee relationship.[59] To narrow down the meaning, at least a little, there are several cases that tell us what *is not* a general custom.[60] Thus, the mere fact that an employer always left the keys in the company truck and available to the employee, did not constitute a general cus-

59. *See generally* Austin *supra* note 17.
60. *E.g.*, Brochu v. Taylor, 223 Wis. 90, 269 N.W. 711 (1936).

tom whereby permission to use the truck for any purpose could be implied.[61] Also, permission to drive a vehicle on the farm was considered not enough to imply permission to use the car on the public highways for personal purposes.[62]

The cases dealing with a history of past use, however, are more enlightening as to what the courts are requiring before permission may be implied. Furthermore, these cases deal both with employees and non-employees. The first prerequisite, of course, is facts showing that the named insured had often, over a long period of time, permitted the use of the automobile for the personal purpose of the permittee.[63] The second factor that must be proven before the courts will imply permission through a history of use is that the owner of the automobile must have knowledge of the past frequent use by the permittee for his own personal purposes.[64] The question immediately arises as to the degree of proof needed to show that there was actual knowledge by the named insured. This, of course, is a question of fact to be decided during the trial by the jury, but even this may be implied knowledge. Thus, the payment by the named insured of a number of excessive gas bills for the automobile after times when the permittee had driven it, was enough evidence for one court to decide that he could deduce the fact of personal use by the permissive user.[65] Third, and finally, there must be proof of acquiescence by the owner and named insured in the users personal use of the car before permission for such may be implied.[66]

Generally then, unless all three factors—history of use, knowledge, and acquiescence—are found in the evidence the courts will not imply permission from the owner to another for his own personal use. One further decision, however, reveals how much a court might deviate from these prerequisites in order to deal with "the hard case" or in order to grant coverage where they feel it should be given. This was done by piling one inference upon another. The evidence revealed that the user had, indeed, been seen a number of times in the past while using the insured's car for personal joy rides. From this evidence the court first inferred that the owner

61. United States Fidelity & Guaranty Co. v. Brann, 297 Ky. 381, 180 S.W.2d 102 (1944).

62. Kitchenmaster v. Mutual Auto. Ins. Co. of Herman, 248 Wis. 554, 22 N.W.2d 479 (1946).

63. *E.g.*, Maryland Cas. Co. v. Continental Cas. Co., 189 F. Supp. 764 (N.D. W.Va., 1960); *see also* Home Indem. Co. v. Norton, 260 F.2d 510 (7th Cir. 1958) and Travelers Indem. Co. v. Neal, 176 F.2d 380 (4th Cir. 1949).

64. *E.g.*, Varble v. Stanley, 306 S.W.2d 662 (Mo. App. 1957). *See also* Rude v. Lehman, 263 Wis. 362, 57 N.W.2d 393 (1953).

65. United States Fidelity and Guaranty Company v. Smith, 279 F.2d 678 (9th Cir. 1960).

66. *E.g.*, McKee v. Travelers Ins. Co., 315 S.W.2d 852 (Mo. 1958); *see also* Peerless Ins. Co. v. Schnauder, 290 F.2d 607 (5th Cir. 1961).

would have known of the use, therefore he *should have known* of it. Finally, the court further inferred that since he *should have been aware* he also must have acquiesced in the use and, thus, held for the defendant and extended the coverage of the policy.[67]

The second situation in which the courts have implied a permission for personal use is where the conduct itself of the named insured leads to such a conclusion. Thus, a general allowance by the owner was implied when he told the permittee that "the keys are in the truck."[68] In another situation where the court implied permission, the evidence showed that the named insured had brought his car home earlier than usual knowing that his son planned to use it that evening; though no actual permission was granted, the implication was there.[69] Finally, when the owner of the car leaves it parked in the center of the street with the motor running while he runs into the theater to buy tickets, permission is implied for the passenger left in the car to move it due to traffic.[70]

The third situation where implied permission is often granted is where the parties are related. Of course, this is a matter of degree and this factor permeates all of these implied permission cases. When the parties are related much weaker evidence is needed before the courts will imply permission under the omnibus clause.[71] However, friendship alone is not enough to demand implied permission;[72] of course, the better the friendship was, the more likely will be decision for the extension of coverage.

It is on the subject of implied permission that North Dakota has a recent and leading decision concerning the omnibus clause. In this situation the driver of the car at the time of the accident had used the car several times on prior occasions while he and the named insured attended North Dakota State University. Further, the driver and the named insured had been together at a party earlier on the same evening of the accident. The owner left the party earlier on the same evening of the accident. The owner left the party in another car, however, leaving his car in front of the house where the party was being held. Much later that night, the

67. Traders & General Ins. Co. v. Powell, 177 F.2d 660 (8th Cir. 1949).
68. Maryland Cas. Co. v. United States Fidelity & Guaranty Co., 86 S.E.2d 801 (1955).
69. Bushman v. Tomek, 222 Wis. 562, 269 N.W. 289 (1936).
70. Coons v. Massachusetts Bonding and Ins. Co., 207 N.Y.S.2d 819 (1960).
71. *E.g.*, Exner v. Safeco Ins. Co., 402 Pa. 473, 167 A.2d 703 (1961); *see also* Elkinton v. Calif. State Auto. Ass'n, 173 Cal. App.2d 338, 343 P.2d 396 (1959). (case of a daughter with no history of past use, held for coverage.) Though less evidence is needed to show implied permission in the case of related parties, insurance coverage may still be denied under policies that specifically exclude coverage for "the insured or any member of the family of the insured residing in the same household as the insured." Thus, the mother of the insured was not covered when injured in an accident occurring while the father of the named insured was driving the insured vehicle even though consent was not an issue. Nodak Mutual Ins. Co. v. Wacker, 154 N.W.2d 776 (N.D. 1967).
72. Mason & Dixon Lines v. Martin, 222 F.2d 328 (4th Cir. 1955).

named insured admitted seeing that his car had been moved since he, then, saw it on the main street of town; but he did not see the driver or talk to him. The North Dakota Court on these facts, refused to imply permission to operate the vehicle so as to allow the user to be an additional insured under the omnibus clause.[73] This was a good decision especially when it is noted that the prior use of the car had always been only after receiving express permission to drive the car. Again, one must remember that the omnibus clause is essentially to protect the named insured from liability and no others—at least, as intended by the insurers. Implied permission further extends the coverage not only in cases such as those referred to above but also in cases where custody of, or access to, the insured's car was available to the person claiming the coverage.[74] For this reason, the courts have generally been very careful before extending insurance coverage through these decisions.

V. *When The Named Insured Grants Permission To Use The Automobile To One Permittee, May That First Permittee Delegate This Permission To a Second Permittee And Thereby Bind The Insurer?*

The issue concerning second permittees, is a very critical one in regard to the omnibus clause if only for the frequency of occurence and litigation. One of the major landmark cases dealing with this problem is that of Aetna Casualty Company v. DeMaison[75] in which the so-called DeMaison rule was formulated. In this case the owner of the insured automobile had an unmarried son living with him. The car was kept in the garage in the rear of the home and the keys were always in a kitchen drawer. The son would use the car several times a week supplying his own gas and oil at such times, but always only after asking his father for it. On the day in question, he got permission to use the car in order to go to the Yorktown Theater in Jenkintown. Instead of going to the movie however, the boy proceeded to Mesina's Inn in Ardsley where he joined a group of friends. The whole group decided to go to a diner three or four miles away and one of the boy's friends, Mrs. DeMaison, wanting to drive, asked the boy, who gladly consented to her driving. On the way, while Mrs. DeMaison was driving, the accident occurred.

73. National Farmers Union Prop. & Cas. Co. v. Ronholm, 153 N.W.2d 322 (N.D. 1967).
74. Whether a person with access to our custody of a car is an omnibus insured is generally decided on the same framework used in these implied permission decisions and for this reason decisions dealing with that aspect are omitted. *E.g.*, Elkington v. Calif. State Auto. Ass'n., 173 Cal. App.2d 338, 343 P.2d 396 (1959).
75. Aetna Cas. and Sur. Co. v. DeMaison, 213 F.2d 826 (3rd Cir. 1954).

On determining whether the omnibus clause of the named insured's liability insurance policy should cover this accident, the Circuit Court of Appeals said there are certain principles generally accepted, one of which was that one to whom the insured has given permission to use his car has no authority to delegate this permission to another so as to bind the insurer. The insured's conduct, however, or the nature or scope of the original permission, may, at times, indicate permission to delegate. The court held, though, that mere permission to use does not in itself, by implication, include any authority to delegate. The court, therefore, held that the circumstances present here did not show that there was any expressed or implied permission given by the boy's father to Mrs. DeMaison to drive the car; nor was there an expressed or implied permission given to the boy to allow him to delegate his own permission to drive to others. Thus, the general rule, namely the DeMaison rule, is that permission to use does not, in the absence of further circumstances, permit delegation of this use to another.

Of course, this general starting point is not followed exclusively.[76] For instance, some state courts have specifically held that the bailee of a car cannot permit a third person to drive it so as to extend the coverage of the policy to that third person in any situation.[77] Other state courts have held that where the first permittee has the right to use the car without any restriction, he has the right to allow others to drive it and, thereby, bind the insurer.[78] Furthermore, the DeMaison rule is often circumscribed or limited without being specifically denied. For example, where a boy left his car with his girl friend while he was in the army, it was held that she had the general authority over the car and thus, during his absence, she could stand in his place in regard to granting permission to use it.[79] It appears that general authority to keep a car for an extended time puts that custodian of the car actually in the place of the named insured.

A study concerning the ability of a first permittee to bind the insurer by delegating his permission to drive to a second permittee, falls quite naturally into two groups: (1) where the first permittee has a general permission, and (2) where he has only limited or restricted permission. Turning first to the former sit-

76. Of course, any courts that follow the initial permission rule hold that such delegation is within the scope of the original permission and, therefore, coverage extends.

77. Ohio, Tenn., and Okla., decisions follow this line.

78. Specifically so held in Ala., Ill., and Calif.

79. Robinsons v. Fidelity & Cas. Co., 190 Va. 368, 57 S.E.2d 93 (1950); *see also* Fireman's Fund Indem. Co. v. Freeport Ins. Co., 173 N.E.2d 543 (Ill. App. 1961). *But see* Maryland Cas. Co. v. Baker, 196 F. Supp. 234 (E.D. Ky. 1961); Card v. Commercial Cas. Ins. Co., 30 Tenn. App. 132, 95 S.W.2d 1281 (1936).

uation, the general rule is well set out by an Eighth Circuit, North Dakota decision. In that case, the named insured turned his car over to his brother for the brother's unrestricted use. Then, without the knowledge or consent of the insured, this first permittee let yet another brother drive the car. While this third brother was using the car for his own personal purposes, he had an accident. The court in holding for the insurer noted that the policy provided that the named insured, or his spouse, may grant permission to use the car and thereby bind the insurer for that additional driver. However, that user may not, in turn, grant permission to use to yet a third party and remain covered.[80] Other courts, however, have said that unrestricted authority to use a car includes the power to delegate it to a second permittee.[81]

To extend this study a bit further one may make several basic statements that generally reveal the actions of the courts. The second permittee has the permission of the named insured through a grant by the original permittee only if: a) the named insured has expressly or impliedly permitted such delegation of permission[82] or b) the use by the second permittee serves some advantages or benefit to the first permittee;[83] and then the courts still will deny coverage where the first permittee has been expressly forbidden to permit use to others[84] or if the use is solely for the benefit of the second permittee and the initial permission is silent on the subject.[85]

Beyond the general outline as expressed above, there are many slight variations as evidenced by decisions of courts throughout the country. This is only natural, when one considers the many variables that may become factors in any given situation. Thus, even without any specific authority for a permittee to delegate permission to use an insured automobile to another person, the conduct of the insured or the nature and scope of the original permission granted by him may be sufficient to extend the insurance coverage.[86] The cases with this possibility, of course, follow the same general standards pointed out in connection with any implied permission. For instance, permission was implied where the named insured granted permission to his daughter to use his car for a business trip knowing that she would be accompanied by a friend.

80. Sunshine Mut. Ins. Co. v. Mai, 169 F. Supp. 702 (D.N.D., 1959) *aff'd* Peterson v. Sunshine Mut. Ins. Co., 273 F.2d 53 (8th Cir. 1959).
81. *E.g.*, Pennsylvania Thresherman & Farm Mut. Cas. Co. v. Crapet, 199 F.2d 850 (5th Cir. 1952); State Farm Mut. Auto. Ins. Co. v. Porter, 186 F.2d 834 (9th Cir. 1951); Touchet v. Fireman's Ins. Co.ofNewark, N.J., 159 So.2d 753 (La. 1964).
82. *E.g.*, M.F.A. Mut. Ins. Co. v. Mullin, 156 F. Supp. 445 (W.D. Ark., 1957).
83. *Id.; see also* Persellin v. State Auto. Ins. Ass'n., 75 N.D. 716, 32 N.W.2d 644 (1948).
84. *E.g.*, Dodson v. Sisco, 134 F. Supp. 313 (W.D. Ark. 1955).
85. *E.g.*, Kadrmas v Mudna, 107 N.W.2d 346 (N.D. 1961).
86. *E.g.*, Holthe v. Iskowitz, 31 Wash.2d 533, 197 P.2d 999 (1948).

The insured's knowledge of the friend's presence extended the insurer's liability when the accident occurred while the friend was driving.[87] Also, where the insured knew that his son's school friends drove his car and the insured did not object, consent and acquiescence were implied.[88] Finally, a number of courts have determined that a first permittee does have the authority to delegate his permission to use an automobile to a second person if it was done in the furtherance of the original purpose for which he got the car. In so holding, the courts appear to maintain that where a permittee gets a car for a specific purpose he may permit another to use the car for that same purpose especially as long as the first permittee accompanies him.[89] It would seem, however, that this again is a confusion between actual use and any use, as discussed earlier in this study.

The second portion of this study must relate to the situation where the first permittee *does not* have a general permission. The great majority of the court tend to deny coverage to the second permittee when restricted permission is all that was given by the owner of the car.[90] Therefore, when a highway patrolman's son was involved in an accident while driving his father's assigned patrol car, the court denied extension of the coverage from the policy of the state. The court said that the boy's father had the car as a permittee of the state and was bound by the police manual which forbade such delegation of permission to another for personal use.[91] Another example of this line of decision was shown when a Wisconsin court denied coverage where the insured had given his daughter permission to use his car to take driving lessons. After using the car in that way, however, the girl let another person drive the car to town for servicing and repairs. The accident occurred on the trip to town.[92]

There is general agreement that if the insured specifically tells the first user that he is not to let anyone else drive, the first user then has no authority to extend that permission so as to make a second permittee an additional insured under the omnibus clause of an insurance policy.[93] However, as it has been mentioned pre-

87. Brooks v. Delta Fire & Cas. Co., 82 So.2d 55 (La. 1955).
88. Menn. v. Mutual Auto. Ins. Co. of Town of Herman, 266 Wis. 517, 64 N.W.2d 195 (1954).
89. Standard Acc. & Ins. Co. v. New Amsterdam Cas. Co., 249 F.2d 847 (7th Cir. 1957); Harrison v. Carroll, 139 F.2d 427 (4th Cir. 1944).
90. *E.g.,* Horn v. Allied Mut. Cas. Co., Des Moines, Iowa, 272 F.2d 76 (10th Cir. 1959); *see also* Aetna Cas. Co. v. De Maison, 213 F.2d 826 (3rd Cir. 1954).
91. Smith v. Insurance Co. of the State of Pa., 161 So.2d 903 (La. 1964); *see also* Hays v. Contry Mut. Ins. Co., 28 Ill.2d 601, 192 N.E.2d (1963).
92. Harper v. Hartford Acc. & Indem. Co., 14 Wis.2d 500, 111 N.W.2d 480 (1961).
93. *E.g.,* Farmer v. Fid. Cas. Co., 249 F.2d 185 (4th Cir. 1957) and Carlton v. State Farm Mut. Auto. Ins. Co., 309 P.2d 286 (Okla., 1957); *see also* Prisuda v. General Cas. Co. of America, 272 Wis. 41, 74 N.W.2d 777 (1956).

viously, some courts have decided that coverage should be allowed where the insured expressly forbade an employee to allow others to drive and he does allow them to do so, though in the scope of the original purpose.[94] Though to follow this latter decision seems to be an over-liberalization of the explicit terms of the contract of insurance.

Finally, the situation where a third permittee is granted permission to drive by a second permittee bears mentioning. Strangely, here at the end of the whole study we may, at last, find a unanimous line of decisions from all of our courts. They have all denied recovery in the absence of explicit or expressed authority from the owner of the automobile.[95] This, then, reveals the absolute bounds past which no court will extend omnibus coverage. Whether a court follows the liberal or the strict rule, at last we find them at a common ground.

Conclusion

Before any of the issues concerning the omnibus clause as discussed in this study can properly be understood, mention must be made of several doctrines or statutory frames against which the clause is flung and with which it must coexist.

First, the inclusion of such an extended coverage clause in all automobile liability policies issued to automobile owners is required specifically by statute in several states.[96] Where this is the case, there is less justification for the main contention that the clause is essentially for the benefit of the insured. However, it may still be argued that the original and basic purpose of the contract agreeement to extend coverage under the clause is still the same. Furthermore, if compulsory financial aid for all accident victims is a proper goal, then a public fund or insurance such as that proposed by the Keeton—O'Connell Plan[97] would seemingly be the better means of accomplishment.

Secondly, in a number of states today are found vicarious liability statutes whereby an owner of an automobile is made liable in tort for death or injury resulting from the negligent operation of the car by any person using or operating the same with the expressed or implied permission of the owner.[98] Reference to this situation has been made earlier in connection with a case deciding

94. Indemnity Ins. Co. of North America v. Metropolitan Cas. Ins. Co., 33 N.J. 507, 166 A.2d 355 (1960).
95. *E.g.*, West v. McNamara, 179 Ohio 187, 111 N.E.2d 909 (1953).
96. *See* Atlantic Cas. Ins. Co. v. Edwards, 42 N.J. 586, 127 A.2d 459 (1956); Olander v. Klapprote, 263 Wis. 463, 57 N.W.2d 734 (1953).
97. KEETON AND O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM; A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).
98. *E.g.*, 62 N.Y. VEHICLE AND TRAFFIC LAWS § 388 (McKinney 1960).

a minor deviation issue. The real extent to which a statute of this nature affects the omnibus clause is exemplified by a 1965 Minnesota case.[99] In this case the defendant gave his daughter permission to use the car to celebrate her birthday. The girl proceeded to pick up three more girls and four boys, one of whom insisted on driving. The girl consented in spite of her father's standing admonition against her allowing anyone else to drive. The four couples drove to another town where they consumed two cases of beer. On the way home, the boy hit the plaintiff's car. The Supreme Court of Minnesota held "that where the bailee is a member of the immediate family of the bailor and is actually a passenger in control of the bailor's vehicle which is being used for a purpose intended by the parties, the car is being operated with the consent of the owner within the meaning of §170.54 notwithstanding the fact that he has expressly forbidden anyone other than the bailee to drive it."[100] Though this is not an insurance case it clearly reveals how such a statute operates to extend the owner's liability. When the statute does extend his liability, the omnibus clause should also extend the insurance coverage if any exists in order to properly protect the named insured.

Thirdly, in the last few years the "family purpose" doctrine has come into prominence. Under this doctrine an automobile that is obtained by the head of the household for the admitted specific purpose of serving his family's use is his responsibility as long as it is, indeed, being driven by one of the immediate family. Thus, by this doctrine the head of the household is held vicariously liable in any accident resulting from the negligent use of the car by his family. The emergence of this doctrine could well have two important effects on the omnibus clause decisions. First, due to vicarious liability imposed upon the family head by this doctrine, it is conceivable that the omnibus clause will be very liberally interpreted to properly protect the insured. Thus, any use made of his car by a member of his family for which he could be held liable could well be determined to be a permitted use in regard to the omnibus clause. Second, with the advent of this doctrine's basic rationale concerning the immediate family, it is, at least, conceivable that the courts may no longer require any expressed permission to be granted by the named insured to the members of his immediate family; not that they will, instead, imply such permission. Furthermore, where this is the case the courts are apt to hold that a family member could give permission to drive the family purpose car to another person and by this consent, bind the insurer. In effect,

99. Lange v. Potter, 270 Minn. 173, 132 N.W.2d 734 (1965).
100. *Id.* at 738.

then, the second user would be considered the first permittee by the courts.

The above trend was not followed, however, by the Nebraska court in 1961. They were confronted by a situation in which a son of the owner of a family purpose car, with two companions, was returning from military training in Nevada. The three boys took turns driving on the trip and one of the friends was driving negligently when an accident occurred which was fatal to the driver of the other car. It was undisputed that the son had permission to drive, but the father had no knowledge nor had he given his consent for the others to drive. The Supreme Court of Nebraska refused to find the owner liable and held that although the son had general authority to drive as a family member, this did not include the authority to delegate the driving to a third party, not a member of the family. The court added that the *family purpose doctrine* is a departure from the general law of master servant, principal agent, and *respondent superior* based solely on public policy. Thus, any expansion of the doctrine must be by the legislature and not the courts.[101] Of course, if this rule were to be accepted, then there would be no effect, in this way, on the omnibus clause.

Against a complex background such as this, there is little wonder that the courts have split asunder when dealing with the omnibus clause. Furthermore, with the increase of travel on the roads of the United States, that is bound to continue and worsen, the litigation concerning this small clause found in insurance policies quite probably will increase. The problems and issues discussed in this study must only continue.

RICHARD MCKENNETT

101. Christensen v. Rogers, 172 Neb. 31, 108 N.W.2d 389 (1961).